8-3-2011

State v. Deluca Appellant's Brief Dckt. 38485

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38485
	)	
v.	)	
	)	
BRIDGETT LEE DELUCA,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Bridgett Lee Deluca timely appeals from the district court's Order Revoking Probation, Judgment of Conviction and Order of Commitment, wherein the district court revoked Ms. Deluca's probation and imposed a unified sentence of seven years, with three years fixed. Ms. Deluca argues that the district court abused its discretion when it denied Ms. Deluca's request to order an updated mental health evaluation pursuant to I.C. § 19-2522 prior to her probation violation disposition. In the alternative, Ms. Deluca argues that the district court abused its discretion when it denied Ms. Deluca's request to order an updated mental health evaluation pursuant to I.C. § 19-2524. Ms. Deluca also argues that the district court abused its discretion when it revoked her probation and denied her I.C.R. 35 motion.

Statement of the Facts and Course of Proceedings

Ms. Deluca was in her home with her sixteen year old daughter when police executed a search warrant and arrested Ms. Deluca for possession of a controlled substance. (Presentence Investigation Report (*hereinafter,* PSI), p.2.)[1] Ms. Deluca was charged with felony possession of a controlled substance and felony injury to child. (R., pp.29-30.) Pursuant to a plea agreement, Ms. Deluca pleaded guilty to both charges. (R., p.91.) In return, the State agreed to amend its information from felony injury to child to misdemeanor injury to child. (06/01/09 Tr., p.7, Ls.6 – 14.) Thereafter, the district court executed a unified sentence of seven years, with three years fixed for

[1] The PSI contains multiple attachments. For ease of reference, the PSI and attachments have been numbered starting with the cover of the PSI and ending on page 209.

the conviction for felony possession of a controlled substance, and retained its jurisdiction for 180 days. (R., p.92.) The district court also ordered Ms. Deluca to serve 120 days of county jail time for felony injury to a child to run concurrently with her unified seven year sentence. (R., p.92.)

Upon completion of her period of retained jurisdiction (*hereinafter,* rider), the district court suspended Ms. Deluca's sentence and placed her on probation.[2] (R., pp.103-107.) After a period of probation the State filed its Motion for Probation Violation, alleging that Ms. Deluca violated various terms of her probation. (R., pp.123-25.) Ms. Deluca admitted to violating terms of her probation (12/06/10 Tr., p.18, L.20 – p.20, L.4.) Ms. Deluca requesting an updated mental health evaluation, but her request was denied by the district court. (12/13/10 Tr., p.22, L.23 – p.23, L.8.) Thereafter, the district court revoked Ms. Deluca's probation and imposed her previously suspended sentence. (R., pp.160-61.)

Ms. Deluca timely filed an I.C.R. 35 motion requesting the district court reduce her sentence. (R., pp.163-64.) The District court denied Ms. Deluca's I.C.R. 35 motion. (R., pp. 185-87.) Ms. Deluca timely appeals from both the district court's orders revoking her probation and denying her I.C.R. 35 motion. (R., p.178-79.)

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[2] The district court had jurisdiction to place Ms. Deluca on probation. The sentencing hearing was originally scheduled for July 20, 2009, but was continued to August 10, 2009. The district court orally retained its jurisdiction on August 10, 2009. The rider review hearing was held approximately 182 days later, which was February 8, 2010. In *State v. Goodgion*, 149 Idaho 17, 20 (Ct. App. 2010), it was held that a district court's jurisdiction pursuant to I.C. § 19-2601(4) was extended beyond the 180th day because the 180th day fell on a Saturday. Here, the 180th day was Saturday, February 6, 2010, and the district court held the rider review hearing on Monday, February 8, 2010. In accordance with *Goodgion*, the district court had the jurisdiction to place Ms. Deluca on probation.

ISSUES

1. Did the district court abuse its discretion pursuant to I.C. § 19-2522 when it failed to order a mental health evaluation of Ms. Deluca prior to her probation violation disposition hearing?

2. Did the district court abuse its discretion pursuant to I.C. § 19-2524 when it failed to order a mental health evaluation of Ms. Deluca prior to her probation violation disposition hearing?

3. Did the district court abuse its discretion when it revoked Ms. Deluca's probation?

4. Did the district court abuse its discretion when it denied Ms. Deluca's Idaho Criminal Rule 35 Motion for a Reduction of Sentence in light of new information indicating that there is a nexus between Ms. Deluca's mental health issues and her substance addiction?

ARGUMENT

I.

The District Court Abused Its Discretion Pursuant To I.C. § 19-2522 When It Failed To Order A Mental Health Evaluation Of Ms. Deluca Prior To Her Probation Violation Disposition Hearing

A. Introduction

Ms. Deluca argues that the mandates of I.C. § 19-2522 are applicable prior to a probation violation disposition hearing. In an opinion from the Idaho Court of Appeals it was held that a district court erred when it failed to order an I.C. § 19-2522 mental health evaluation prior to its disposition of an I.C.R. 35(b) motion. Since a district court has inherent I.C.R. 35(b) authority to reduce a sentence previously imposed at a probation violation disposition hearing, the mandates of I.C. § 19-2522 were applicable to the distruict court at Ms. Deluca's probation violation disposition hearings.

Ms. Deluca argues that the district court abused its discretion by denying her request to order a mental health evaluation in light of the fact that the her probation officer stated that she would benefit from an updated mental health evaluation and that both the State and her trial counsel addressed her mental health at the probation violation disposition hearing.

B. The District Court Abused Its Discretion Pursuant to I.C. § 19-2522 When It Failed To Order A Mental Health Evaluation Of Ms. Deluca Prior To Her Probation Violation Disposition Hearing

"The determination of whether to obtain a psychological evaluation lies within the sentencing court's discretion." *State v. Crane*, 137 Idaho 188, 189 (Ct. App. 2002) (citing I.C. § 19-2522 (1); I.C.R. 32(d); *State v. Jones*, 132 Idaho 439, 442 (Ct. App. 1999). I.C. § 19-2522 contains the legal standards which govern the district court's

decision to whether to order a psychological evaluation. *Id.* "Pursuant to I.C. § 19-2522(1), if there is reason to believe that the mental condition of the defendant will be a significant factor at sentencing and for good cause shown, the sentencing court must appoint a psychiatrist or licensed psychologist to examine and report upon the defendant's mental condition." *Id.* Even in instances where "there there is reason to believe the defendant's mental condition will be a significant factor at sentencing, the court nonetheless may deny the request for a new evaluation if the information contained in existing reports satisfies the requirements of I.C. § 19-2522(3)." *State v. McFarland*, 125 Idaho 876, 879 (Ct. App. 1994).

While the language of I.C. § 19-2522 (1) contains the phrase "a significant factor at sentencing," the requirements of I.C. § 19-2522 have been applied to a trial court's disposition of an I.C.R. 35 motion. In *State v. Izaguirre*, 145 Idaho 820 (Ct. App. 2008) the defendant, Mr. Izaguirre, requested a psychological evaluation in support of his I.C.R. 35(b) motion. *Id.* at 822. Regarding this request, the Idaho Court of Appeals stated as follows:

> In this case Izaguirre did not request a psychological evaluation prior to sentencing, and on appeal he does not argue that the trial court should have ordered one *sua sponte.* Therefore, there is no claim of a direct violation of I.C. § 19-2522{ TA \s "I.C. § 19-2522" }. Izaguirre did, however, request a neuropsychological evaluation in aid of his Rule 35 motion, and factors that bear upon the need for such an evaluation before sentencing are also relevant to this request. We therefore examine whether the trial court abused its discretion in denying Izaguirre's motion.

Id. at 823. Therefore, a psychological evaluation pursuant to I.C. § 19-2522 can be requested after sentencing and in support of an I.C.R. 35(b) motion, and a district court's decision concerning that request is reviewed under an abuse of discretion standard.

The rule from *Izaguirre*, which enables trial court's to order an I.C. § 19-2522 psychological evaluation in support of an I.C.R. 35 motion, should be applied to a request for a psychological evolution prior to a probation violation disposition hearing because Idaho trial court's have inherent I.C.R. 35 authority when revoking probation there is no distinction between an exercise of authority under I.C.R. 35 in ether situation. A trial court has inherent authority pursuant to I.C.R. 35 to *sua sponte* reduce the length of the original sentence upon the revocation of probation. *State v. Jensen*, 138 Idaho 941, 944 (Ct. App. 2003). As stated in *Izaguirre*, *supra*, the Idaho Court of appeals will review a district court's denial of a psychological evaluation which is requested in support of I.C.R. 35 motion on an abuse of discretion standard. Since the power to reduce the length of a sentence under both of these circumstances, a district court's decision to deny a request for a psychological evaluation under both of the circumstances should be treated the same. Moreover, a defendant can file a motion requesting a reduction of their sentence pursuant to I.C.R. 35 within fourteen days from an order revoking probation. I.C.R. 35(b). It would hardly be consistent to allow a psychological evaluation to be ordered after probation is revoked but not before it is revoked.

In this case, a probation violation disposition hearing was scheduled to occur on December 13, 2010, but a continuance was requested by Ms. Deluca's trial counsel. (R., p.158.) At that hearing, the following dialog occurred:

MR. TABER:	Your Honor, I was also thinking that maybe an update of the mental health evaluation might be in order.
THE COURT:	I don't see any indications that would make that a good idea.
MR. TABER:	She tells me that's what her probation officer –

THE COURT: No, I'm not going to order any additional reports at this stage. I don't see any basis for it, based on my review of the file.

(12/13/10 Tr., p.22, L.23 – p.23, L.7.)

The district court's decision to deny Ms. Deluca's request for an updated mental health evaluation should be reviewed under an abuse of discretion standard. In accordance with *Crane*, *supra*, the first inquiry is to determine whether there was reason to believe that Ms. Deluca's mental health was a significant factor at the probation violation disposition hearing. While requesting the updated mental health evaluation, Ms. Deluca's trial counsel began addressing a statement made by her probation officer. (12/13/10 Tr., p.23., Ls.3-4.) The district court did not allow trial counsel to finish his statement. (12/13/10 Tr., p.23, Ls.3-8.) From a review of the record it appears that trial counsel was referring to the following statement:

> PHYSCIAL AND MENTAL HEALTH
> The defendant appears to have ongoing mental health issues. She was receiving treatment and medication, however, her ongoing use of methamphetamine no doubt negated any positive effects treatment, counseling and medication would have had.
>
> I believe the defendant would benefit from an updated mental health evaluation.

(PSI, p.189.) The record provides further support for this contention. Ms. Deluca indicated in her plea agreement advisory form that she under the care of a mental health professionals and receiving medications to treat her ADHD, personality disorder, bi-polar disorder, and her obsessive compulsive disorder (*hereinafter,* OCD). (R., p.81.) Ms. Deluca indicated that that she takes Topomax for her OCD and her bulima, Wellbutrin and Prozac for her depression. (PSI, p.9.) Ms. Deluca has considered suicide. (PSI, p.9.)

Ms. Deluca's mental issues were addressed by the State and her trial counsel at the probation violation disposition hearing. The State argued Ms. Deluca's mental health issues in aggravation at the hearing as follows:

> She knows she has mental health issues, and she needs to address them. So she gets out on probation February 8, 2010, telling Your Honor how grateful she is and how she's going to be a success in the future, and within four month's she's back to using methamphetamine again in June.

(12/17/10 Tr., p.65, L.25 – p.66, L.6.) Ms. Deluca's trial counsel stated:

> Your Honor, I think that it's clear that Bridgett not only has substance abuse issues, she has got mental health issues, I think that she would be evaluated through mental health court, I think a good candidate for that.
>
> We have checked, and her past offenses, unlike drug court, they are not something that is going to keep her from being able to participate in the mental health court.

(02/17/10 Tr., p.73, Ls.9-18.) At the probation violation disposition hearing Ms. Deluca stated that she was welcome to return to the Affinity treatment center where she could get help with her bi-polar disorder, ADHD, and substance addiction. (12/17/10 Tr., Ls.20-24; PSI, p.155.) Ms. Deluca's mental health issues were significant enough for both the State and her trial counsel addressed them at the probation violation disposition hearing. In addition, mental health care professionals approved her to be a patient in their facility. Therefore, Ms. Deluca's mental health was a significant factor at sentencing.

According to Ms. Deluca's probation officer, the previous mental health report needed to be updated and therefore it was not sufficient to meet the requirement of I.C. § 19-2522 (3). As stated in *Crane*, *supra*, even if a defendant's mental health will constitute a significant sentencing factor, an updated mental health report need not be ordered if the previous report is sufficient to meet the requirements of I.C. 19-2522(3). I.C. 19-2522(3) states:

(3) The report of the examination shall include the following:

(a) A description of the nature of the examination;

(b) A diagnosis, evaluation or prognosis of the mental condition of the defendant;

(c) An analysis of the degree of the defendant's illness or defect and level of functional impairment;

(d) A consideration of whether treatment is available for the defendant's mental condition;

(e) An analysis of the relative risks and benefits of treatment or nontreatment;

(f) A consideration of the risk of danger which the defendant may create for the public if at large.

Here, Ms. Deluca's existing mental health evaluation indicated that further mental health evaluation would he been useful. Ms. Deluca provided an evaluation performed by a psychologist with her presentence materials. (PSI, pp.33-38.) The mental evaluation documented Ms. Deluca's ADHD, bipolar-disorder, bulimia, and borderline personality disorder. (PSI, p.33.) The evaluation stated that Ms. Deluca's reports that she had "instability in interpersonal relationships, efforts to avoid abandonment, unstable and intense interpersonal relationships, identity disturbance, impulsivity with substance abuse, affective instability, difficulty controlling anger and chronic feelings of emptiness." (PSI, p.34.) Ms. Deluca was treated with medications for her ADHD, but started abusing her medication. (PSI, pp.33-34.) The psychologist, who performed her mental health elevation, listed as one if his recommendations that Ms. Deluca "may benefit from a psychiatric evaluation to assess her current medication regime." (PSI, p.34.) Since Ms. Deluca's mental health evaluation stated another medical evaluation would be required to assess her current medication regime, that evaluation did not meet the mandatory requirement contained in I.C. § 19-2522(3)(d), requiring an analysis of

whether treatment is available for Ms. Deluca's mental health issues. For the same reason, the evaluation failed to provide an analysis of the "relative risks and benefits of treatment or nontreatment," mandated under I.C. 19-2522(e).

Even if the previous mental health evaluation meets the requirements mandated by I.C. § 19-2522 (3) when it was initially created, it was insufficient at the time of the probation violation disposition hearing. As mentioned above, Ms. Deluca's probation officer stated that the benefit Ms. Deluca had received from her previous mental health treatment had abated due to her ongoing substance addiction, and for that reason an updated mental health evaluation was recommended. (PSI, p.189.)

In light of her significant background with mental health issues and the probation officer's express statement that Ms. Deluca should get an updated mental health elevation because her ongoing substance addiction has changed the status of her mental health, the district court abused its discretion when it denied Ms. Deluca's request for an updated mental health evaluation.

II.

The District Court Abused Its Discretion Pursuant To I.C. § 19-2524 When It Failed To Order A Mental Health Evaluation Of Ms. Deluca Prior To Her Probation Violation Disposition Hearing

A. Introduction

In the event it is determined that I.C. § 19-2522 is not applicable prior to a probation violation disposition hearing, Ms. Deluca argues, in the alternative, that the district court abused its discretion by denying her request to order a mental health evaluation in light of the fact that the her probation officer stated that she would benefit from an updated mental health evaluation and that both the State's and her trial counsel

addressed her mental health at the probation violation disposition hearing. By failing to order a mental health evaluation, the district court abused its discretion to order a mental health violation pursuant to I.C. § 19-2524.

B. The District Court Abused Its Discretion Pursuant To I.C. § 19-2524 When It Failed To Order A Mental Health Evaluation Of Ms. Deluca Prior To Her Probation Violation Disposition Hearing

I.C. § 19-2524 enables a district court to order a mental health evaluation prior to a probation violation disposition hearing. The pertinent language of I.C. § 19-2524 follows:

> When a defendant has pled guilty to or been found guilty of a felony, or when a defendant who has been convicted of a felony has admitted to or been found to have committed a violation of a condition of probation, the court, prior to the sentencing hearing or the hearing on revocation of probation, may order the defendant to undergo a substance abuse assessment and/or a mental health examination.

I.C. § 19-2524 (1). The Idaho Court of Appeals has interpreted this statute as follows:

> The statute specifically provides that a court "may" order the defendant to submit to a mental health examination. The word "may" is permissive and denotes an exercise of discretion. *See State v. Harbaugh,* 123 Idaho 835, 837, 853 P.2d 580, 582 (1993). Thus, a court possesses discretion to order or decline to order a mental health examination prior to sentencing or at disposition pursuant to I.C. § 19–2524.

State v. Hanson, 150 Idaho 729, 723 (Ct. App. 2011). Additionally, I.C.R. 32(d) allows a district court to order a psychological evaluation as part of the presentence report, and I.C.R. 32(f) states that a district court "may order an additional investigation of the case if the judge deems it necessary and use such results in considering the disposition." I.C.R. 32(f) uses the word may, which in accordance with *Harbaugh*, *supra*, denotes that the district court has the discretion to decide whether or not it will order an updated mental health evaluation.

When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry. The sequence of the inquiry is: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989) citing *Associates Northwest, Inc. v. Beets*, 112 Idaho 603, 605 (Ct. App. 1987)).

In this case, a probation violation disposition hearing was scheduled to occur on December 13, 2010, but a continuance was requested by Ms. Deluca's trial counsel. (R., p.158.) As stated above, the following dialog occurred:

MR. TABER:	Your Honor, I was also thinking that maybe an update of the mental health evaluation might be in order.
THE COURT:	I don't see any indications that would make that a good idea.
MR. TABER:	She tells me that's what her probation officer –
THE COURT:	No, I'm not going to order any additional reports at this stage. I don't see any basis for it, based on my review of the file.

(12/13/10 Tr., p.22, L.23 – p.23, L.7.) From the preceding dialogue it appears that the district court rightly perceived that it had the discretion to order an updated mental health evaluation. Therefore, the next inquiry is whether the district court acted within the outer boundaries of its discretion consistent with the applicable legal standards.

Ms. Deluca recognizes that the district court has a broader range of discretion to order a mental health elevation under I.C. § 19-2524, than it does under I.C. § 19-2522. As stated in section I(B), supra, I.C. § 19-2522 requires a district court to order a me

natal health evaluation if the a defendant's mental health is determined be a significant factor at sentencing. I.C. 19-2524 only states that a district court may order a mental health evaluation, it does not contain any of the mandatory language which is in I.C. 19-2522. Even though the district court has a broader range of discretion under I.C. 19-2524, the district court must employ reason when it denies a defendant's request pursuant to that statute. Here, the district court employed no reasoning when it denied Ms. Deluca's request for a mental health evaluation. Other than the district court's statements that its review of the record provides no basis for an updated mental health report, the district court provided no explanation. Ms. Deluca's arguments supporting her contention that an updated mental health evaluation was warranted in this matter are contained in section I(B) of this brief above and need not be repeated, but are incorporated herein by reference.

III.

The District Court Abused Its Discretion When It Revoked Ms. Deluca's Probation

A. Introduction

While Ms. Deluca has a history of methamphetamine addiction and a criminal history caused by that addiction, she had taken significant steps toward her long term rehabilitation after she was arrested and before the probation violation disposition hearing. Therefore, the district court abused its discretion when it revoked her probation in light of Ms. Deluca's rehabilitative progress.

B. The District Court Abused Its Discretion When It Revoked Ms. Deluca's Probation

Ms. Deluca asserts that, given any view of the facts, the district court abused its discretion when it revoked her probation. When a defendant appeals from an order revoking probation this Court has utilized the following framework:

> The decision to revoke a defendant's probation on a suspended sentence is within the discretion of the district court. I.C. § 20-222. In a probation revocation proceeding, two threshold questions are posed: (1) did the probationer violate the terms of probation; and, if so, (2) should probation be revoked? *State v. Case,* 112 Idaho 1136 (Ct.App.1987). Then, if the court determines that probation should be revoked, a third question arises-what prison sentence should be ordered? If a prison sentence previously has been pronounced but suspended, that sentence may be ordered into execution, or, alternatively, the court is authorized under I.C.R. 35 to reduce the sentence upon revocation of the probation. *See State v. Adams,* 115 Idaho 1053 (Ct.App.1989).

State v. Corder, 115 Idaho 1137, 1138 (Ct. App. 1989).

Ms. Deluca concedes that she violated the terms of her probation. Accordingly, she only contests the district court's decision to revoke her probation. "A district court's decision to revoke probation will not be overturned on appeal absent a showing that the court abused its discretion." *State v. Sanchez*, 149 Idaho 102, 105 (2009) (citing to *State v. Lafferty,* 125 Idaho 378, 381 (Ct. App. 1994)). "When a district court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine whether the lower court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and reached its decision by an exercise of reason." *State v. Knutsen*, 138 Idaho 918, 923 (Ct. App. 2003) (citing to *State v. Hedger,* 115 Idaho 598, 600 (1989)).

"In deciding whether revocation of probation is the appropriate response to a violation, the court considers whether the probation is achieving the goal of

rehabilitation and whether continued probation is consistent with the protection of society." *State v. Leach*, 135 Idaho 525, 529 (Ct. App. 2001) (citing to *State v. Jones,* 123 Idaho 315, 318 (Ct. App. 1993) ; *State v. Hass,* 114 Idaho 554, 558 (Ct. App. 1988)). "[I]f a probationer's violation of a probation condition was not willful, or was beyond the probationer's control, a court may not revoke probation and order imprisonment without first considering alternative methods to address the violation." *Id.* (citing to *Bearden v. Georgia,* 461 U.S. 660, 672-73 (1983) ; *Lafferty,* 125 Idaho at 382-83)). "Only if the trial court determines that alternatives to imprisonment are not adequate in a particular situation to meet the state's legitimate interest in punishment, deterrence, or the protection of society, may the court imprison a probationer who has made sufficient, genuine efforts to obey the terms of the probation order." *Id.*

Ms. Deluca's relapse was not entirely willful. Ms. Deluca was on probation and was prescribed Vyvanse. (12/17/10 Tr., p.75, L.25 – p.76, L.1.) The use of this medication triggered Ms. Deluca's relapse. (12/17/10 Tr., p.76, Ls.1-3.) Ms. Deluca obtained an appropriate prescription after she was incarcerated for her probation violations, and has been doing well. (12/17/10 Tr., p.76, L.s.13-22.) Ms. Deluca's medication, Vyvance, was partially responsible for her relapse while on probation, however, she had taken the steps to alleviate this relapse trigger prior to her probation violation disposition hearing.

Additionally, Ms. Deluca had changed her residence which alleviated another relapse trigger. According to her trial counsel:

> When this all occurred, she was living in the home that is currently the subject of a property bond.
>
> But I think that the home had some notoriety amongst drug offenders, and I think it's difficult when - - I don't think [Ms. Deluca] would have to go out and try to find friends to use drugs with. I think they would come to her.

And so I think that made it much more difficult.

(12/17/10 Tr., p.72, Ls.3-12.) Prior to the probation violation disposition hearing, Ms. Deluca had moved out of that home and was preparing to use it as a rental property. (12/17/10 Tr., p.77, Ls.9-13.) Ms. Deluca stated that she was not going to return to that house and was living with her parents. (12/17/10 Tr., p.77, Ls.9-13.)

Ms. Deluca also developed the ability to ask for help with her addiction. This is evinced by her actions which include her decisions to enroll in an intensive outpatient treatment program, obtained a sponsor, and cut off communication people that might trigger a relapse. (12/17/10 Tr., p.76, L.17 – p.19.) In the past, Ms. Deluca would try to deal with her addiction by herself, but with these new tools she is more likely to avoid relapse. (12/17/10 Tr., p.76, L.23 – p.77, L.6.)

Prior to her probation violation disposition hearing, Ms. Deluca had taken positive steps toward her rehabilitation. The district court abused its discretion when it revoked her probation, in light of the rehabilitate steps Ms. Deluca had taken prior to her probation violation disposition hearing.

IV.

The District Court Abused Its Discretion When It Denied Ms. Deluca's Idaho Criminal Rule 35 Motion For A Reduction Of Sentence In Light Of New Information Indicating That There Is A Nexus Between Ms. Deluca's Mental Health Issues And Her Substance Addiction

A. Introduction

Ms. Deluca's family wrote letters in support of her I.C.R. 35 motion which indicate that her Vyance prescription was given to her to treat her eating disorder. Vyance is an amphetamine based drug which triggered her relapse while on probation. Further, this new evidence information indicates a nexus between Ms. Deluca's mental health and

the underlying offense, which amplifies amount of mitigating weight this issue should have been afforded.

B. The District Court Abused Its Discretion When It Denied Ms. Deluca's Idaho Criminal Rule 35 Motion For A Reduction Of Sentence In Light Of New Information Indicating That There Is A Nexus Between Ms. Deluca's Mental Health Issues And Her Substance Addiction

A motion to alter an otherwise lawful sentence under I.C.R. 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994) (citing *State v. Forde*, 113 Idaho 21 (Ct. App. 1987), and *State v. Lopez*, 106 Idaho 447 (Ct. App. 1984)). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* (citing *Lopez*, 106 Idaho at 450).

Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982). The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Ms. Deluca does not allege that her sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Ms. Deluca must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385

(1992)). The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978) (*overruled on other grounds by State v. Coassolo*, 136 Idaho 138 (2001)).

"Where an appeal is taken from an order refusing to reduce a sentence under Rule 35, [the Appellate Court's] scope of review includes all information submitted at the original sentencing hearing and at the subsequent hearing held on the motion to reduce." *State v. Arazia*, 109 Idaho 188, 189 (Ct. App. 1985) (citing to *State v. Yarbrough,* 106 Idaho 545 (Ct. App. 1984)). "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction." *State v. Knighton*, 143 Idaho 318, 320 (2006) (citing *Trent,* 125 Idaho, at 253 (Ct. App. 1994) , and *State v. Hernandez,* 121 Idaho 114 (Ct. App. 1991)).

As a preliminary matter, Ms. Deluca would incorporate the arguments made in section III(B), *supra*.

Ms. Deluca provided new information in support of her I.C.R. 35 motion, which indicates that the treatment she received for her mental health issues have contributed to the commission of the underlying offense. The Idaho Supreme Court held that even in instances where there is no nexus between a crime and the mental health issue(s), mental health evidence is relevant to sentence mitigation. *State v. Payne*, 146 Idaho 548, 569-70 (2008). Here, Ms. Deluca's parents wrote that, "[o]ften Bridgett[']s medical prescriptions have been derivatives of meth to use for her emotional needs as well [as her] eating disorder." (R., p.168.) According to Ms. Deluca's sister:

> [Ms. Deluca] is a person with a eating and drug problem. I think the problem with her "need" to be thin is a major factor in her [addiction]. She started dieting and using meth as a way of keeping weight off. The use of meth [increased] and became an [addiction], which has caused the majority of her problems with the law, family[,] and herself.

(PSI, p.170.) Her sister went on to write that Ms. Deluca needs counseling for her eating disorder and drug problem. (PSI, p.170.) Additionally, the description of Ms. Deluca's mental health contained in section I(B), supra, is incorporated herein by this reference. Since there is a nexus between Ms. Deluca's mental health issues and the underlying offense, her culpability is reduced, increasing the mitigating weight which should be afforded to those issues.

There are other mitigating factors present in this case, which when viewed in light of Ms. Deluca's sentence, support the conclusion that the district court abused its discretion by imposing an excessively harsh sentence. Specifically, Ms. Deluca has family support. In *State v. Shideler*, 103 Idaho 593, 594 (1982), the Idaho Supreme Court noted that support of family and friends were mitigating factors. Here, Ms. Deluca's parent's allowed her to move into their home. (12/17/10 Tr., p.72, Ls.2-3.) Her parents were screening her contacts so she could not communicate with her olds friends associated with methamphetamine. (R., p.168.) Ms. Deluca received many support letters attached to her I.C.R. 35 motion. (R., pp.167-77.) These letters were written by her parents, sister, uncle, aunt, and even a former client. Ms. Deluca's family support is widespread and is significant because her parents are willing to provide her with a safe drug free environment and not allow any of her former drug related friends have contact with her.

Additionally, Ms. Deluca has a strong employment background. In *State v. Hagedorn*, 129 Idaho 155, 161 (Ct. App. 1996), the defendant's employment

background was considered as a mitigating factor. Ms. Deluca has worked as a cosmetologist, aerobics instructor, spinning instructor, and a dance choreographer. (PSI, p.9.) Ms. Deluca has various certificates which evince her accomplishment. (PSI, p.88-91.) According to a reverend Lugenbill, Ms. Deluca volunteered at the Veterans Administration cutting hair. (PSI, p.154.) Ms Deluca was also employed at the time of the probation violation disposition hearing. Therefore, Ms. Deluca's employment background is a mitigating factor.

In sum, Ms. Deluca provided new information which evinces a nexus between her mental health issues and the underlying offense. This in addition to the other mitigating factors supports the conclusion that the district court abused its discretion when it failed to reduce her sentence pursuant to her I.C.R. 35 motion.

CONCLUSION

Ms. Deluca respectfully requests that this Court vacate her sentence, and remand his case for a new sentencing hearing after a complete evaluation of Ms. Deluca's mental health conditions is made in accordance with I.C. § 19-2522 and I.C.R. 32. Alternatively, Ms. Deluca respectfully requests that this Court reinstate her probation and remand this case to the district court to order terms of probation it deems appropriate. Alternatively, Ms. Deluca respectfully requests that this Court reduce the length of her sentence as this Court deems appropriate.

DATED this 3rd day of August, 2011.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3rd day of August, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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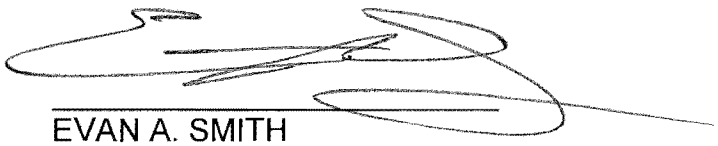

EVAN A. SMITH
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SFW/eas